No. 80-2100

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

QUENTIN ROGERS, *et al.*,

Appellants,

versus

HERMAN LODGE, *et al.*

ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF *AMICI CURIAE* OF THE N.A.A.C.P. LEGAL DEFENSE AND EDUCATIONAL FUND, INC. AND THE CONGRESSIONAL BLACK CAUCUS IN SUPPORT OF APPELLEES

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MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE OF THE N.A.A.C.P. LEGAL DEFENSE AND EDUCATIONAL FUND, INC., AND THE CONGRESSIONAL BLACK CAUCUS IN SUPPORT OF APPELLEES.

Pursuant to Rule 36, the N.A.A.C.P. Legal Defense and Educational Fund, Inc., and the Congressional Black Caucus request

leave to file a Brief Amici Curiae in the instant appeal. Amici are organizations dedicated to protection of the right to vote of minorities, especially Black Americans, in this country.

Appellees have consented to the request. Appellants have not.

Amici assert in their brief that this Court should decide in this appeal no more than that Appellees have submitted sufficient evidence to sustain their burden of proof and persuasion. Amici also argue that the decision herein should be based on evidentiary principles universally applied in the federal courts. These arguments, as developed in the Brief Amici Curiae, have not been presented by the parties. Yet, they are critical for proper disposition of this appeal. For

these reasons, Amici Curiae request leave to file the brief.

Respectfully submitted,

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INTEREST OF AMICI

The N.A.A.C.P. Legal Defense and Educational Fund, Inc., is a non-profit corporation established under the laws of the State of New York. It was formed to assist black citizens to secure their constitutional rights through the prosecution and defense of lawsuits. To carry out its purposes, the charter of the N.A.A.C.P. Legal Defense and Educational Fund authorizes the organization to provide legal services gratuitously to black persons suffering injustice by reason of racial discrimination. For many years, attorneys of the Legal Defense Fund have represented parties in racial discrimination cases before this Court and the lower courts.

The Congressional Black Caucus is composed of the eighteen Black members

of the United States House of Representatives.

The Congressional Black Caucus believes that the right to vote is of fundamental importance because it is preservative of all rights. Yick Wo v. Hopkins, 118 U.S. 356 (1886). The Congressional Black Caucus, on behalf of its minority constituents, is concerned that the exercise of this fundamental right be equally accessible to all citizens, especially minority citizens whose right to vote was systematically denied in many parts of this country.

Because of its concern about election schemes that deny blacks on account of their race an effective voice in the governmental affairs of their country, state and community, the Congressional Black Caucus has an interest in the de-

velopment of a reasonable standard of proof for challenging such schemes.

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Abbrevations:

The abbrevation J.S. refers to Appellant's Statement as to Jurisdiction.

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BRIEF AMICI CURIAE OF THE N.A.A.C.P. LEGAL DEFENSE AND EDUCATIONAL FUND, INC., AND THE CONGRESSIONAL BLACK CAUCUS

SUMMARY OF ARGUMENT

This Court should affirm the judgment below of the Court of Appeals for the

Fifth Circuit invalidating the at-large election system in Burke County, Georgia on the grounds that it was purposefully maintained by defendents in order to minimize or cancel out the voting strength of black citizens, in Burke County.

Whether the applicable standard of liability under the Fourteenth Amendment, the Fifteenth Amendment, and Section 2 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973, requires proof of intentional racial discrimination or a showing of discriminatory "effects", need not be decided. Under either standard, plaintiffs appellees presented sufficient evidence to demonstrate that appellants purposefully have maintained the County's at-large system for racially discriminatory reasons.

The Fifth Circuit's judgment should also be affirmed on the ground that the

District Court's decree is a remedial measure to redress pre-existing violations of the Fourteenth and Fifteenth Amendments, and § 2 of the Voting Rights Act of 1965, and to enjoin voting practices perpetuating an existent purposeful denial of minority access to the political process.

The only issues before this Court are whether the quality and nature of the evidence presented at trial on the fact of dilution and purposeful discrimination were sufficient to satisfy appellees' burden of producing evidence, and whether the District Court's finding, affirmed by the Court of Appeals, that appellees had met their burden of persuasion, was clearly erroneous. Because appellees presented sufficient evidence of purposeful discrimination, this appeal can be determined without resolving issues left open in City

of Mobile, Alabama v. Bolden, 446 U.S. 55 (1980), and without deciding whether proof of purposeful discrimination is an essential element of a claim for relief based upon impermissible vote dilution under the Fourteenth Amendent, the Fifteenth Amendment, and § 2 of the Voting Rights Act of 1965.

This appeal can also be decided without determining the general circumstances, if any, under which the vote dilution criteria of Zimmer v. McKeithen, 485 F.2d 1297 (5th Cir. 1973) (en banc), aff'd on other grounds, sub nom., East Carroll Parish School Bd. v. Marshall, 424 U.S. 636 (1975), can be applied to identify circumstantial evidence relevant to proving a discriminatory purpose.

The facts in this case are extreme. They depict ongoing efforts by a white

minority, in a jurisdiction with a history of pervasive and continuous de jure discrimination, to exercise plenary political dominion over a black majority. The means chosen to exercise this dominion include political and social isolation of the black majority, and denial or abridgement of their exercise of the franchise.

Through such means, local governmental leaders have perpetuated the purposeful denial of access of the black citizens of Burke County to the political process. This case is sui generis. It should be decided on its own special facts. These facts and the findings of the District Court require, as the Court of Appeals recognized, affirmance of the judgment below. Those findings are not clearly erroneous.

ARGUMENT

I

THE ONLY QUESTION WHICH THE COURT SHOULD DECIDE IS WHETHER THE CIRCUMSTANTIAL EVIDENCE OF DEFENDANTS' DISCRIMINATORY PURPOSE IS SUFFICIENT TO ESTABLISH A VIOLATION OF FEDERAL LAW

In their Statement As To Jurisdiction, appellants assert that this appeal presents a variety of issues for determination by the Court. The principal issue identified by appellants for plenary consideration is whether, and when, the vote dilution criteria formulated by the court below in Zimmer v. McKeithen, supra, can be used to determine circumstances under which the quality and quantum of evidence in a "vote dilution" case will suffice to permit an inference that state or local officials

have adopted or retained for racially discriminatory purposes an at-large voting system which has an adverse impact upon black citizens.

Appellants also argue that Mobile v. Bolden invalidates use of the "Zimmer" criteria, and other criteria employing what appellants deem to be an "effects" standard, as factors to prove purposeful discrimination. Subsumed under the Zimmer issue is a subsidiary question concerning the relevance of, and the weight to be accorded, evidence which shows unresponsiveness by the local legislatie body to the general needs of a minority group whose voting strength is diluted by an at-large system.

Appellants ask the Court to decide that "unresponsiveness" is a fact that is irrelevant to claims based upon dilution

of minority voting strength. Whatever the merits and the importance of these issues generally, plaintiffs' extensive evidence of defendants' discriminatory purpose obviates any necessity for resolving these issues.

To sustain the judgment below, this Court, like the Court of Appeals below, can indulge in the assumption that, under Mobile v Bolden, supra, federal standards governing vote dilution claims require proof that the challenged action was based upon a racially discriminating purpose. The correctness of this assumption, however, need not be determined for it clearly appears from the record that the evidence presented at trial was more than sufficient to prove that defendants had the requisite discriminatory purpose.

This parsing of the questions presented reduces this appeal to a rather routine inquiry concerning the adequacy of circumstantial evidence to prove the elements of a claim for relief based upon impermissible dilution of the voting strength of a minority group.[1/] This issue was resolved by the Court of Appeals in accordance with principles developed by this Court in City of Mobile v. Bolden; Whitcomb v. Chavis, 403 U.S. 124 (1971); White v. Regester, 412 U.S. 755 (1972);

1/ Put more precisely, the actual issues presented by this appeal involve a determination of: (1) the scope of a federal district court's power, in an action based upon diminution or cancellation of minority voting strength, to regard proffered pieces of evidence as relevant to proof of the claim; and (2) the extent to which a federal district court can allow proof of the elements of a claim for vote dilution to be established through circumstantial evidence.

Washington V. Davis, 426 U.S. 229 (1976); Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977). See, also Wright v. Rockefeller. 376 U.S. 52 (1964).

II

THE COURT OF APPEALS FOR THE FIFTH CIRCUIT PROPERLY RECOGNIZED THAT UNLAWFUL DILUTION OF A MINORITY GROUP'S VOTING STRENGTH WAS A VALID CAUSE OF ACTION AND CORRECTLY IDENTIFIED FACTS WHICH EVIDENCE PROOF OF DILUTION

A. Nature of the Claim for Relief

This Court, in numerous decisions, has recognized a citizen's rights under the Fourteenth and Fifteenth Amendments, to require governmental officials to refrain from using invidious means to "minimize or cancel out the voting strength of racial or political elements of the voting popula-

tion."[2/] Fortson v. Dorsey, 379 U.S. 433, 439 (1965). See, White v. Regester, 412 U.S. 755 (1972); Whitcomb v. Chavis, 403 U.S. 124 (1971); Mobile v. Bolden, supra.

Early attempts, such as in Whitcomb v. Chavis, supra, to sue on a claim based upon impermissible dilution of a minority group's voting strength were initially rejected. The grounds for rejection were

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2/ In Fortson v. Dorsey, supra, this Court considered for the first time the validity of a cause of action based upon dilution of a minority group's voting strength. The Court said that:

> It might well be that, designedly or otherwise, a multimember constituency apportionment scheme, under the circumstances of a particular case, would operate to minimize or cancel out the voting strength of racial or political elements of the voting population. When this is demonstrated it will be time enough to consider whether the system still passes constitutional muster. 379 U.S. at 439.

varied. In Whitcomb v. Chavis, for example, the claim was rebutted because (1) the challenged multi-member districts were not "conceived or operated as purposeful devices to further racial or economic discrimination"[3/] and because the Court refused to accept the notion that the mere "fact that the number of ghetto residents who were legislators was not in proportion to ghetto population", constituted adequate proof of "invidious discrimination absent evidence and findings that ghetto residents had less opportunity than did other ... residents to participate in the political processes and to elect

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3/ The Court concluded therefore that "there was no basis for asserting that the legislative districts in Indiana were designed to dilute the vote of minorities." 403 U.S. at 412.

legislators of their choice."[4/]

Whitcomb v. Chavis, supra, failed to resolve many of the important questions concerning the nature and description of the bundle of interests encompassed by the right to forestall government action which designedly minimizes or cancels out minority voting strength on the basis of race. It did, however, indicate a need to define

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4/ 403 U.S. at 149. The Court said it:

> discovered nothing in the record or in the court's findings indicating that poor Negroes were not allowed to register or vote, to choose the political party they desired to support, to participate in its affairs or to be equally represented on those occasions when legislative candidates were chosen. Nor did the evidence purport to show or the court find that inhabitants of the ghetto were regularly excluded from the slates of both major parties, thus denying them the chance of occupying legislative seats. 403 U.S. at 150.

more precisely the constituent elements of the right and the nature of the comcomitant injury[5/] as well as a need to articulate

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5/ In denying relief, the Court expressed some of the reasons for its reluctance to uphold plaintiff's assertion in Whitcomb of a claim for relief. The Court noted that "(t)he voting power of ghetto residents may have been 'cancelled out' as the District Court held, but this seems a mere euphemism for political defeat at the polls." 403 U.S. at 153. The Constitution, said the Court, was not designed to protect racial and other minorities from "suffer(ing) the disaster of losing too many elections." Id. Moreover, the Court stated that it is not a denial of equal protection to deny legislative seats to losing candidates, even in those so-called 'safe' districts where the same party wins year after year." Id. In justifying this conclusion, the Court stated that:

> The mere fact that one interest group or another concerned with the outcome of Marion County elections has found itself outvoted and without legislative seats of its own provides no basis for invoking constitutional remedies where, as here, there is no indication that this segment of the population is being denied access to the political system. 403 U.S. at 155.

a distinction between an unlawful diminution of a minority group's voting strength and a disproportionate or continuous loss of elections at the polls.

In White v. Regester, supra, the first decision by the Court invalidating the use of multimember districts on account of their use to dilute minority voting strength for invidious racial reasons, the Court identified elements of the cause of action and, citing Whitcomb v. Chavis, described plaintiff's burden of proof in the following terms:

> (I)t is not enough that the racial group allegedly discriminated against has not had legislative seats in proportion to its voting potential. The plaintiffs' burden is to produce evidence to support findings that the political processes leading to nomination and election were not equally open to participation by the group in question - that its members had less opportunity than did other residents in the district to participate

in the political processes and to elect legislators of their choice. 6/

B. Evidence of Impermissible Vote Dilution

Following the Supreme Court's decision in White v. Regester, the Fifth Circuit, in Zimmer v. McKeithen, supra, set forth what it termed "a list of factors that courts should consider in evaluating the constitutional permissibility of voting practices

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6/ The Court concluded, based upon its review of the evidence before the District Court, that the District Court had not unreasonably found that "the black community has been effectively excluded from participation in the Democratic primary selection process" ... and was therefore generally not permitted to enter into the political process in a reliable and meaningful manner." 412 U.S. at 767. Similar findings and conclusions were reached by the Court with respect to the effects in Bexar County of the at-large system on Mexican-Americans. Implicit in this holding was a judgment by the Court that some form of vote dilution had occurred, that the injury was legally cognizable, and that it was unlawfully brought about by government officials.

alleged to discriminate against racial minorities." 485 F.2d 1297, 1305 (1973). The factors were described in the following manner:

> ... where a minority can demonstrate, a lack of access to the process of slating candidates, the unresponsiveness of legislators to their particular interests, a tenuous state policy underlying the preference for multi-member or at-large districting, or that the existence of past discrimination in general precludes the effective participation in the election system, a strong case is made. Such proof is enhanced by a showing of the existence of large districts, majority vote requirements, anti-single shot provisions for at-large candidates running from particular geographical subdistricts. The fact of dilution is established upon proof of the existence of an aggregate of these factors. The Supreme Court's recent pronouncement in White v. Regester, supra, demonstrates, however, that all these factors need not be proved in order to obtain relief.

485 F.2d at 1305.

The decision in Zimmer v. McKeithen, supra, revealed glaringly how acute the

need was to provide a set of evidentiary standards for vote dilution claims based upon racial discrimination. Closely related to this need was the parallel need to identify elements of the cause of action, especially elements of the claim which establish proof of dilution of a minority group's voting strength.

Since the Court of Appeals below purported to apply the Zimmer criteria under circumstances in which the standard of liability was assumed to require proof of purposeful discrimination, it was necessary for the Court of Appeals to determine how these criteria are relevant for determining when an injury for vote dilution exists and how they relate to proof of discriminatory intent.

C. The Zimmer Criteria and Their Significance for Establishing Voting Dilution

The five Zimmer factors, apart from whatever relevance they may have at times for proving discriminatory purpose, bear significantly upon whether a minority group has been rendered helpless in protecting its political and social interests. To that extent, the Zimmer factors, derived from White v. Regester, are indicia of the extent to which a minority group's political defeat at the polls cannot be attributed to the rough and tumble of traditional politics. The Zimmer factors thus serve as determinants of the degree to which vote dilution has occurred and of the need for judicial review.

The severity and permanence of vote dilution are determined by the condition, history, and status of the affected minor-

ity group in the larger community. They are also a function of those characteristics of the electoral process which magnify the ability of the dominant majority to utilize racial discrimination to minimize minority political influence and participation.

Nothing in City of Mobile v. Bolden affects this calculus. The opinion in Mobile did not focus on whether a dilution in black voting strength had occurred. Rather, the concern in Mobile was whether proof of a discriminatory purpose was an element of plaintiffs' claim for relief.

The five factors which the Zimmer Court of Appeals gleaned from White v. Regester and Whitcomb v. Chavis measure the uncouthness or "irrationality" of an electoral system which operates to diminish or exclude minority partici-

pation.[7/] See, Mobile v. Bolden, 446 U.S. at 86. (Stevens, J., concurring). The Zimmer factors are important indicia of when the members of a minority group are likely to be subjected to political isolation and to have common interests which cannot be expressed by taking joint political action.

In addition to showing the degree of uncouthness and irrationality inherent in continued maintenance of a challenged electoral system, these factors indicate the extent to which the system is maintained

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7/ The use of a tenuous state policy to continue the effects of past discrimination against a minority whose access to the political process has been eliminated or curtailed by past discrimination is "uncouth" and "irrational" when carried out by means of an electoral system whose special features are that they inhibit attempts by the minority group to gain access to the political process while helping to elect government officials and lawmakers who fail to exhibit good-faith concern for the political and other needs and aspirations of the minority group.

without neutral justification. They thus satisfy Justice Stevens' requirement for an objective test for measuring dilution. See, Mobile v. Bolden, supra, 446 U.S. at 90-91 (Stevens, J. concurring).

D. Application of the Zimmer Factors to Prove Dilution

Both the District Court and the Court of Appeals considered the extent to which black voting strength had been diluted in Burke County. The Court of Appeals referred to evidence of bloc voting which it found to be "clear and overwhelming". 639 F.2d at 1378. The existence of bloc voting, the Court noted, "enhances the likelihood that those seeking to manipulate the electoral system for discriminatory purposes will succeed". Id., n. 41.

Another circumstance evidencing dilution was the virtual non-existence of

black suffrage before 1965 when the Voting Rights Act was adopted. Also, as the courts below found, "[i]nadequate and unequal educational opportunities, both in the past and present, as the result of official discriminatory acts" intensified the degree of dilution of black voting strength. 631 F.2d at 1378. A reason for the relationship between inadequate education and dilution was given by an expert witness who testified at trial that "one reason Blacks . . . have been ineffective in the political process, is the fact that they have completed less formal education". Id.

Further evidence of the effective exclusion of blacks from participation in the electoral process was found in the "past and present operation of the county's Democratic primary system and in the

Georgia law making it more difficult for Blacks to serve as chief registrar in a county." Id. The political isolation of blacks is reflected in the almost complete absence of blacks from the Burke County Democratic Executive Committee and their exclusion from the political process generally as a result of historical discrimination practiced against blacks. Id.

Another significant fact which the Court found determinative of the presence of dilution was the depressed socio-economic status of blacks. 639 F.2d at 1378. Poverty, lack of equal employment opportunities, and inferior education, the District Court found, had a "direct negative impact on the opportunity for Blacks to effectively participate in the electoral process". Id. at 1379. The Court of Appeals held that this finding was "not

clearly erroneous." Id.

Also found not clearly erroneous was the District Court's finding that blacks were unable, in part, to participate meaningfully in at-large elections in Burke County as a result of the:

> social reality that person-to-person relations, necessary to effective campaigning in a rural county, was virtually impossible on an interracial basis because of the deep-rooted discrimination by Whites against Blacks. 639 F.2d at 1379.

In this context, the large size of the County, nearly two-thirds the size of the State of Rhode Island, and the majority vote requirement, in conjunction with the need for candidates to run for specific seats and the lack of a residency requirement, increased the likelihood that the electoral system would continue to exclude blacks from the political process. This finding of the District Court

was held by the Court of Appeals to be "sound and well supported". 639 F.2d at 1381.

These findings, made in accordance with the Zimmer factors constitute adequate grounds for a finding that black citizens in Burke County have involuntarily suffered a substantial dilution in their voting strength. A substantial diminution in their available political opportunities, such as evidenced here, is a serious injury which warrants judicial review.

III

PLAINTIFFS' PRESENTED SUFFICIENT EVIDENCE TO PROVE THAT DEFENDANTS HAD A DISCRIMINATORY MOTIVE IN ADOPTING AND MAINTAINING BURKE COUNTY'S AT-LARGE SYSTEM FOR ELECTING COUNTY COMMISSIONERS

On the basis of this Court's decision in Mobile v. Bolden, the Court of Appeals assumed that the governing constitutional

standard under the Fourteenth And Fifteenth Amendments to the Constitution of the United States requires a showing of discriminatory intent by defendants in order for plaintiffs to prove a claim for relief based upon unlawful dilution, or cancellation, of a minority group's voting strength.

Intent, amici curiae submit, is not an element of a claim for relief based upon dilution of minority voting strength. This question, however, need not be reached by the Court in the instant action since the nature and quality of the evidence presented at trial were sufficient to prove the existence of defendants' unlawful discriminatory intent to dilute or cancel out the voting strength of black citizens in Burke County.

A. Standards for Proving Intent.

In Washington v. Davis, 426 U.S. 229 (1976) and Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977), the Supreme Court held that the equal protection clause of the Fourteenth Amendment prohibits racial discrimination only when a discriminatory purpose is shown for the racially discriminatory action. The Court further stated that none of its previous decisions had "embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional solely because it has a racially disproportionate impact". Washington v. Davis, 426 U.S. at 239. This rule, said the Court was applicable to all claims involving racial discrimination under the equal protection

clause of the Fourteenth Amendment.

The Court acknowledged in Washington v. Davis, supra, that the discriminatory purpose need not be expressed or appear on the face of the alleged discriminatory action. Actions otherwise neutral, the Court observed, might violate the equal protection clause in their application.

The Court in Washington v. Davis offered guidelines for establishing proof of the existence of a discriminatory purpose. It emphasized that a discriminatory purpose could be proved by circumstantial evidence. 426 U.S. at 242. In Arlington Heights v. Metro Housing Corp., supra, however, the Court recognized the difficulty in proving a discriminatory purpose and pointed out that "[d]etermining whether invidious discriminatory purpose was a motivating factor demands a sensitive

inquiry into such circumstantial and direct evidence of intent as may be available". 429 U.S. at 266.

The Court, in Washington v. Davis and Arlington Heights, gave several illustrations of the means by which circumstantial evidence might be used to establish the existence of a discriminatory intent. As one example, the Court noted that "an invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another." Washington v. Davis, 426 U.S. at 242. An inference of this nature might be made, the Court said, whenever the circumstances and the discriminatory impact demonstrate, as a practical matter, that the discrimination cannot be explained on nonracial grounds. Id.

The Court emphasized that an inference of discriminatory purpose might emerge in two different ways. First, the inference might be drawn when a clear pattern emerges that is "unexplainable on grounds other than race" even though the action is otherwise neutral on its face. Arlington Heights, 429 U.S. at 266. Second, an inference of discriminatory intent might be based upon what appears to be a "single invidiously discriminatory government act." Id., n. 14.

Next, the Court stated that the historical background of the discriminatory action might be used as circumstantial evidence to prove intent. Arlington Heights, 429 U.S. at 267. In particular, it said that "[t]he specific sequence of events leading up to the challenged decision also may shed some light on the decision-maker's

purposes". Id. As an example, it pointed out how

> "[d]epartures from the normal procedural sequence also might afford evidence that improper purposes are playing a role. Substantive departures too may be relevant, particularly if the factors usually considered important by the decision-maker strongly favor a decision contrary to the one reached. Arlington Heights at 267.

Finally, the Court emphasized that the legislative or administrative history of a law will sometimes be relevant for proving intent. The Court recognized, however, the difficulties which would arise if legislators were compelled to testify about the purposes which they and other legislators were pursuing when enacting the law or which would arise if they were compelled to recall contemporary statements made by them or the other members of the legislature. In citing the need and availability

of such testimony, the Court recognized that it would be necessary to depart from the normal rules barring the use or compulsion of such testimony.[8/] Arlington Heights, 429 U.S. at 268.

The Court's enumeration of the various ways in which discriminatory intent can be proved was illustrative, and not intended to be exhaustive. It confirmed, however,

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8/ On the other hand, the evidentiary inquiry should not focus exclusively or primarily on direct evidence of illicit legislative motive since such evidence is "difficult or impossible" to obtain. Palmer v. Thompson, 403 U.S. 217, 225 (1940). See Mobile v Bolden, supra, 446 U.S. at 134 (Marshall, J. dissenting). Here, the adoption of the challenged practices took place in a legislative body that kept no records, at a time so remote that no contemporaneous witnesses are still alive. Since the passage of the 1965 Voting Rights Act, legislators have become too sophisticated to acknowledge illegal motives. To require direct evidence of legislative purpose would pro tanto repeal the Fifteenth Amendment for black citizens in Burke County.

that the Court's imposition of an intent standard was not designed to constitute an insurmountable obstacle to successful prosecution of racial discrimination claims under the Fourteenth Amendment. It also confirmed that traditional evidentiary rules governing the use of circumstantial evidence are applicable for proving the existence, in racial discrimination cases, of a discriminatory motive.

B. Application of the Legal Standards

Neither Washington v. Davis nor Arlington Heights was a vote dilution case. The problem posed by vote dilution cases is how the principles of Washington v. Davis and Arlington Heights are to be articulated and applied in the context of an action in which the essential claim is that an electoral system is maintained to minimize or dilute minority voting strength.

In its application of these principles, the Court of Appeals conceded at the outset that satisfaction of the Zimmer factors did not per se imply, in each and every circumstance, that the defendants had acted with the requisite discriminatory intent. On the other hand, the Court of Appeals left open the possibility that satisfaction of the Zimmer criteria might, in some cases, be sufficient, when considered in conjunction with other credible evidence, to establish proof of a discriminatory purpose in the maintenance of an at-large system.

What is relevant, therefore, is not the name which the Court of Appeals used either to characterize the evidence or to designate the evidentiary criteria which it applied, but rather the nature of the evidence itself and its relevance to

proving the elements of the cause of action.

Designations such as "Zimmer factors", "dilution of minority voting strength", and "existence of a discriminatory purpose", cannot be used to obscure the fact that this case must be tried and determined in accordance with the same evidentiary rules which are used for the trial of cases. Even if this Court's decision in Mobile v. Bolden is read as imposing an intent standard under the Fourteenth Amendment, the Fifteenth Amendment, and section 2 of the Voting Rights Act of 1965, there is nothing in any of the various opinions written in Bolden which suggests that a special or ad hoc set of evidentiary standards is to be applied in vote dilution cases to determine the relevance and suffficiency of evidence.

The evidence presented by plaintiffs and reviewed by the courts below was admissible evidence under the Federal Rules of Evidence. Rule 402 of the Federal Rules of Evidence adopts the general principle that "[a]ll relevant evidence is admissible". Relevant evidence is defined by Rule 401 as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence". See, also McCormick, Evidence (2nd Ed. 1972).. One question therefore which a case of this nature presents is whether evidence proffered at trial is relevant within the meaning of Rule 401.

Relevancy in this trial, as in others, cannot be determined without asking the question "Relevant to what"? Unlike the

case in most other actions, there is no real issue here as to whether the defendants performed the act in question. It is undisputed that these defendants maintain the present at-large system for electing county commissioners in Burke County.

What is at issue is not this fact but their purpose in adopting and maintaining this system. More specifically, the issue is whether defendants' purpose in adopting or maintaining the at-large system is racially discriminatory. Relevancy therefore is directed to this issue. Evidence is admissible on this issue if it has a tendency to make the existence of purposeful discrimination more probable or less probable than it would be without the evidence.

In the context of an action for vote dilution, Rule 401 makes defendants'

motive, or intent, a relevant inquiry. Evidence tending to establish motive or intent is thus relevant. Rule 404(b) of the Federal Rules of Evidence provides some guidance on the type of evidence which can be used to prove intent and motive. It states that evidence of other crimes, wrongs, or acts are admissible for "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident". Such evidence, however, cannot be used to prove that a specific act was performed. The existence of other bad acts or wrongs can however be used as circumstantial evidence for determining the intent or motive with which a defendant acted.

In applying these rules to the facts of the present appeal, we see first that both direct and circumstantial evidence may

be used, and secondly that evidence of prior wrongs and bad acts may be considered in determining the nature of defendants' purpose. The latter is particularly important in evaluating the significance of defendants' other racially discriminatory actions.

Rules 401 and 404 are especially important in vote dilution cases. Legislators are too sophisticated, since the passage of civil rights laws, to leave direct evidence of their discriminatory purposes lying around waiting to be discovered. Courts recognize, however, that the "right to redress does not turn on the degree of subtlety with which a discriminatory plan is effectuated." Lodge v. Buxton, 639 F.2d at 1358. For this reason, the Courts of Appeals below held that "[c]ircumstantial evidence, of nec-

essity, must suffice, so long as the inference of discriminatory intent is clear." Id.

Plaintiffs presented substantial evidence at trial to show that defendants acted with a discriminatory purpose in using Burke County's at-large system to exclude or lessen participation by blacks in the benefits of the electoral franchise. The Court of Appeals considered this evidence only for the purpose of showing that the County's system of at-large representation was maintained for an unlawful discriminatory purpose. It assumed, on the ground that the at-large laws were adopted at a time when blacks were prohibited from exercising the franchise, that they were not adopted to minimize black political participation.

By indulging this assumption, the court excluded evidence which favored plaintiffs. This was error. Given Burke County's denial in 1911 of the franchise to blacks, the more probable assumption was that county officials intended to limit black political participation whenever possible. They could have reasonably assumed that their denial of the franchise to blacks could not continue indefinitely. Indeed, the District Court should have inferred that county officials in 1911 probably assumed that their ability to deny the franchise would become less effective over time, especially, as the attacks on their practice mounted in strength.

Faced with such a prospect, county officials in Burke County may well have assumed that adoption in 1911 of an at-large system was the only way to prolong their otherwise episodic supremacy over a

majority black population. Since blacks constituted then a majority of the population, the adoption in 1911 of an at-large system had advantages superior to those of a single-member districting system.

With a single member districting system, the large number of black citizens in the County would guarantee that blacks would be able to gain immediate control in one or more of the single member districts. Over time, more districts would be represented by blacks since black registration figures were bound to increase with the passage of time. Democracy's gain would here be a loss for white supremacy.

An at-large system in 1911 would have none of these disadvantages since it would avoid a sharing of political control between blacks and whites, at least until the number of black registered voters began

to approximate the number of white registered voters. The adoption of an at-large system in 1911 was therefore an option well suited for maintaining the reins of government in the hands of white citizens at the expense of black citizens. Thus, it cannot be assumed that at-large schemes adopted during the denial of the franchise to blacks, are for that reason alone, immune to challenges that they were adopted to minimize or cancel out minority voting strength.[9/]

9/ Plantiff's proof that the at-large electoral system was adopted when blacks were denied the franchise is, therefore, "some evidence" that the system was adopted for the purpose of perpetuating the effects of past discrimination. Since the courts below took a contrary view of the significance of the adoption of the at-large system during an era when blacks were not permitted to vote, plantiff's evidence concerning defendants' discriminatory intent was thus never fully assessed by the District Court and the Court of Appeals. Failure to take it into account may warrant a remand if the judgment below is not affirmed.

Both the District Court and the Court of Appeals regarded the virtual absence of black suffrage before the passage in 1965 of the Voting Rights Act as a critical factor. Also critical was the increase during the short period from 1965 to the present of black suffrage, measured in terms of registered voters.

Starting from a base of almost zero, the percentage of black registered voters is today somewhere between 38% - 44% of the black population. This phenomenal fact, brought about solely through federal intervention on the side of black suffrage, warranted a finding, and the District Court so found, that:

> the marked increased in the registration Blacks following the enactment of the 1965 Voting Rights Act clearly indicates that past discrimination has had an adverse effect on Black voter registration which lingers to this

date. 9/ Order at p. 7. Also, see Lodge v. Buxton, 639 at 1378.

This evidence of the change in the availability of the franchise to black citizens in Burke County is relevant on two points. First, it provides cumulative evidence that the entire electoral process in the county was used systematically to deny and curtail the right of blacks to vote.

It thus evidences a massive violation of the Fourteenth Amendment, the Fifteenth

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9/ Technically speaking this is not the type of procedural or substantive departure from normal practice which is included in the list of criteria provided in Arlington Heights. It is, however, within the spirit of what the Arlington Court contemplated as factors relevant to proving intent. The departure here is not between what local law was before and what it was after 1965, but between two time periods, one in which the County and the State claim that they were not discriminating on the basis of race, and one in which federal law must intervene to prevent further discriminatory state action adversely affecting the exercise of the franchise by blacks.

Amendment, and section 2 of the Voting Rights Act. It also causes the focus of this case to shift from the question of whether maintenance of the at-large system is a violation of federal law because of the purpose in maintaining it, to the question of whether the dismantling of the at-large system is a remedial measure for redressing systemic violations of the right of blacks to exercise the franchise. See, Green v. New Kent County School Board, 391 U.S. 430, 437-38 (1963); Louisiana

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9/ footnote (continued)

The contrast between the two time periods, and the events occurring therein, is probative of whether defendants restrict the exercise of the franchise by blacks. The implication, of course, is that federal intervention was required to prevent Burke County from denying the franchise to black citizens. This is a fair inference from the evidence. This circumstance distinguishes the present action from that in Mobile v. Bolden.

v. U.S., 380 U.S. 145, 154 (1965); Kirksey v. Board of Supervisors of Hinds County, 554 F.2d 139 (5th Cir.) (en banc), cert. denied, 434 U.S. 968 (1977). See also Section IV, infra,.

The second point to which this evidence goes is defendants' motive for engaging in such massive denial of the franchise to blacks. Obviously, there is evidence here that defendants had a discriminatory motive in their de jure denial of the franchise. Under Rule 404(b) of the Federal Rules of Evidence, this evidence is admissible to prove defendants' motive, or intent, with respect to similar actions having a discriminatory impact upon black voters in Burke County, such as maintaining the county's at-large system.

Other evidence showing the exclusion of blacks from the political process was considered in great detail by the Court of

Appeals. For example, the Court considered the State's use of the "white primary", subsequently struck down by this Court in Chapman v. King, 154 F.2d 460 (5th Cir.), cert. denied, 327 U.S. 800 (1946). It also assessed the purposes which legislatures had in mind in enacting a law making it difficult for blacks to serve as a chief registrar in a county in Georgia. See Ga. Code Ann. § 34-605.

Also assessed were the circumstances which contributed, in part, to the virtual exclusion of blacks from the Burke County Democratic Executive Committee. These were relevant factors, under Rules 401 and and 404 of the Federal Rules of Evidence for determining the defendants' motives in maintaining the present electoral system.

Much of appellants' attack on the judgment below stems from the probative value attributed by the Court of Appeals'

to evidence presented by plaintiffs showing that County officials with legislative and administrative responsibilities were unresponsive to the general and particular interests of black citizens in carrying out their duties. Appellants question in this appeal both the relevance of this evidence and the weight which may have been attributed to it as an indicator of defendants' intent to discriminate.

As amici demonstrated earlier in this brief, evidence of unresponsiveness is always relevant on the fact of dilution. It may, however, as in the present case, sometimes be relevant to proving the existence of a discriminatory purpose.

Where evidence is offered in a vote dilution case to show that legislators are unresponsive to the compelling legitimate interests of a sizable racial or ethnic

minority, and that it is indifferent to the adverse consequences which an at-large electoral scheme may have upon the members of that minority, then it is natural to inquire why the gross indifference exists and whether the evidence which shows the existence of the unresponsiveness is evidence which also shows that the legislature is engaging in purposeful racial discrimination against members of the minority group in other areas of life. The answers to questions such as these is what determines in a specific case whether particular items of evidence which show unresponsiveness are relevant to proving that defendants had the requisite discriminatory intent.

In the instant action, the evidence showed that defendents and other public officials were unresponsive to black

interests in almost every major segment of political and social life, such as voting, schools, employment, appointments to public office, municipal services, etc. The unresponsiveness was of such breadth and magnitude that the Court of Appeals properly deemed the County Commissioners' insensitivity to be unexplainable except "as a conscious and willful effort on their part to maintain the invidious vestiges of discrimination." 639 F.2d at 1377. See, Arlington Heights, 429 U.S. at 266.

The totality of defendants' unresponsiveness was sufficiently extreme that the Court of Appeals concluded that to find anything other than a conscious effort to maintain the invidious effects of racial discrimination "would be to fly in the face of overwhelming and shocking evidence". 639 F. 2d at 1377. Under the Arlington Heights

criteria, it was appropriate for the courts below to draw such an inference. In sum, the Court of Appeals, in assessing the District Court's evaluation and weighing of the evidence, did no more than to attribute to the evidence, including evidence on unresponsiveness, the probative value and significance which the evidence was entitled to receive in reason, logic and experience.

IV

THE THREE CHALLENGED VOTING PRACTICES AND PROCEDURES PERPETUATE A PURPOSEFUL DENIAL OF ACCESS OF BLACKS TO THE POLITICAL PROCESSES IN BURKE COUNTY AND MAY BE ENJOINED AS A REMEDIAL MEASURE

The judgments of the courts below are also sustainable as an appropriate and necessary remedy of an extant constitu-

tional violation of the Fourteenth and Fifteenth Amendments.[10/]

The District Court found that the system for electing County Commissioners perpetuated an existing purposeful denial of any opportunity for blacks to participate in the county government. These factual findings were upheld by the Court of Appeals.

Under the approach of White v. Regester, supra as developed in Kirksey v. Board of Supervisors of Hinds County, 554 F.2d 139 (5th Cir. 1977) (en banc) cert. denied, 434 U.S. 968 (1977), the relevant inquiry for a "remedy" case is whether the

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10/ We do not address in this brief the question whether the three challenged voting practices also abridge the rights of black voters in violation of Section 2 of the Voting Rights Act simply because of their discriminatory effect. On that question, we incorporate by reference, Brief for Georgia Association of Black Elected Officials, et al. as Amici Curiae, Rogers v. Lodge, No. 80-2100.

challenged voting practices continue prior purposeful voting rights violations. While a plurality of this Court has held in City of Mobile v. Bolden, that a showing of racial motivation is a necessary ingredient of a Fourteenth or Fifteenth Amendment violation, a majority of the Court has held, in other areas of racial discrimination, that once a de jure constitutional violation is shown, the state's actions will be judged by the continuing effects of its past, purposeful conduct. Keyes v. School District No. 1, 413 U.S. 189 (1973); Wright v. Council of City of Emporia, 407 U.S. 451, 462 (1972); Swann v. Charlotte-Mecklenburg Bd. of Education, 402 U.S. 1, 26(1971). See also, Columbus Board of Education v. Penick, 443 U.S. 449, 538-39 (1979).

If analyzed therefore as a remedy case, given the record of past, purpose-

ful racial discrimination and official unresponsiveness, the District Court's findings,[11/] and the long history of racial discrimination by appellants and the State of Georgia, the standard for appellate review is simply whether the remedy imposed by the district court was justified and appropriately tailored to cure the "condition which offends the Constitution." Milliken v. Bradley, 433 U.S. 267 (1977).

Having determined that blacks in Burke County were historically denied an oppor-

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11/ The District Court made specific findings concerning the way in which the three voting practices in question -- (1) at-large voting, (2) numbered post requirement, and (3) majority run-off -- perpetuate the effects of past, de jure racial discrimination in Burke County (J.S. 71a-77a, 92a-93a). The District Court also found that the officials responsible for governing Burke County have acted to maintain the inequities created by that past discrimination. (J.S. 77a-82a)

tunity to participate in the County government and were intentionally excluded from the electoral process, the District Court carefully examined the nexus between that prior history and appellees' continued inability to participate effectively in the political process. The court found a link between past purposeful discrimination[12/] and (1) low black voter registration and participation (J.S. 71a-72a); (2) racial bloc voting by whites against any black candidate or any white candidate identified with the interests of the black community (J.S. 72a-73a); (3) barriers to black candidacies stemming from the "personal contacts politics of Burke County" (J.S.

12/ "This litany of past history -- much of it relating to official action -- also commands a conclusion that in significant aspects it was purposeful and intentional," Kirksey v. Board of Supervisors, 554 F2d at 144.

88a-89a);[13/] (4) the low socio-economic status of blacks as a group and the size of the county, in combination with the numbered-post and majority vote run-off requirements, and (4) the exclusion of blacks from county government based on the Commissioners' failure to appoint blacks to committees and boards in a meaningful fashion (J.S. 78a) and the Commissioners' racially discriminatory pattern of decision making in the distribution of public goods and services (paving county roads, J.S. 79a; county hiring, J.S. 79a; donation of county funds to buy band uniforms for the all-white private school, J.S. 82a).

13/ "...Blacks are shut out of the normal course of politics in this tightly-knit rural county...(given) the virtual segregation of all social, religious, and business organizations." (J.S. 89a)

The record shows, and the District Court found, that the relationship between the past purposeful discrimination and present conditions is not remote. (See, e.g. discriminatory exclusion of blacks from Grand Jury until 1977, abated only after litigation, J.S. 75a; The existence of unpaved roads to the predominantly black school, J.S. 80a; failure to establish additional registration sites for more than a few months and only after a pre-trial conference, J.S. 81a; disproportionately low registration rate of blacks even after the passage of the Voting Rights Act of 1965, J.S. 72a; virtually "lily-white" Democratic Party County Executive Committee despite a clear mandate from national and state charters, J.S. 88a; segregated public facilities and places of public accommodation until the 1960's, segregated schools

until 1969, and some schools still essentially segregated, J.S. 74-76a).[14/]

Although the explicit disfranchising requirements in Burke County have been suspended by federal legislation or abandoned after litigation, and although appellants have recently ceased many of the

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14/ In its Brief for United States as Amicus Curiae, Lodge v. Buxton, 639 f.2d 1358, States observes that the relationship between the past discrimination and present conditions in Burke County is not attenuated. "The court below noted that 99% of the black residents of Burke County and over 75% of the white residents were born in Georgia. Enforcement of the racially discriminatory laws, customs and practices...by the State and its agencies did not cease until the late 1960's in some instances and even later in others. Thus, virtually all of the black residents of voting age in Burke County and three-fourths or more of such white residents have been subjected throughout their lives to a social and legal structure founded on the proposition 'that the Negro is in no respect the equal to the white man', "Brief for United States at 28 (citations omitted).

overtly racial practices described at length in appellees' brief and the opinions below, the courts below concluded that appellants have "never actively set out to eliminate the consequences of...past intentionally ...[discriminatory] policies." Columbus Board of Eduation v. Penick, supra, 443 U.S. at 461. Where a defendant has violated the constitutional rights of a minority group on account of race, discontinuation of the violation is not an adequate remedy if conditions flowing from the constitutional violation continue to disadvantage the victims of the violation. Milliken v. Bradley, supra, 433 U.S. at 281-82.

The District Court determined, and the Court of Appeals affirmed, that blacks continue to be excluded from participation in the political and governmental processes

of Burke County as a result of both the lingering effects of recent prior discrimination and the continued use of the three challenged voting practices.[15/] Enjoining the use of those voting practices was, therefore, justified as an appropriate and proper exercise of the court's remedial power. White v. Regester, supra, 412 U.S. at 765-70; Milliken v. Bradley, supra, U.S.

15/ While a plurality of this Court in Mobile rejected an "effects" standard for proving a violation under the Fourteenth and Fifteenth Amendments, the Court in Mobile specifically declined to overrule White v. Regester, supra, where a unanimous Court endorsed the use of single-member districts "to remedy the effects" of past discrimination against Mexican-Americans. 412 U.S. at 769. For an extended discussion of the general constitutional principles involved in framing equitable remedies, see Brief for the United States as Amicus Curiae Lodge v. Buxton, supra, at 19-25. See, also, Brief for the Lawyers' Committee for civil Rights Under Law as Amicus Curiae, Rogers v. Lodge, No. 80-2100, at 16ff.

at 282 (1977); Louisiana v. United States, 380 U.S. 145, 154 (1965).[16/]

CONCLUSION

For the reasons stated above, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted

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16/ (T)he Court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future." Louisiana v. United States, id. at 154.